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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEB 28 1997

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Closed Captioning and Video Description)
of Video Programming)
)
Implementation of Section 305 of the)
Telecommunications Act of 1996)
)
Video Programming Accessibility)

MM Docket No. 95-176

INITIAL COMMENTS OF AMERITECH NEW MEDIA, INC.

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Ameritech New Media, Inc. ("Ameritech") respectfully offers the following comments on the Notice of Proposed Rulemaking released in the above-captioned docket on January 17, 1997 ("NPRM"). In the NPRM, the Commission makes several proposals to implement Section 305 of the Telecommunications Act of 1996 ("TA96"), a provision of TA96 that added new Section 713 in the Communications Act -- Video Programming Accessibility.¹

¹ Pub. L. 104-104, 110 Stat. 56 (1996). Section 713 to the Communications Act, 47 U.S.C. Section 613.

I.

INTRODUCTION AND SUMMARY

Section 713 focuses primarily on requirements for closed captioning. As the Commission explained in the NPRM, “[c]losed captioning is an assistive technology designed to provide access to television for persons with hearing disabilities. Closed captioning is similar to subtitles in that it displays the audio portion of a television signal as printed words on the television screen. To assist viewers with hearing disabilities, captions may also identify speakers, sound effects, music and laughter.”²

Section 713 requires the Commission to prescribe regulations and implementation schedules to ensure that:

(1) video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captions ... [subject to certain exceptions]; and

(2) video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions ... [subject to certain exceptions].³

² NPRM at par. 1 (footnote omitted).

³ Section 713(b). Video programming first published or exhibited prior to the effective date of the Commission’s regulations is referred to as “library programming.”

There are three exceptions to these requirements. Section 713 gives the Commission authority to exempt classes of programs or services if closed captioning would be economically burdensome to the provider or owner. The Commission also can exempt a provider or owner from the requirements of Section 713 if closed captioning would be inconsistent with contracts in effect on the date of TA96's enactment. Finally, the Commission can exempt a provider or owner from those requirements of Section 713 which would result in an undue burden.

Ameritech has had a long tradition of providing specialized services to the hearing impaired community. And Ameritech New Media is willing to continue that tradition by doing its part to ensure that closed captioning for its video programming is made available to the greatest extent reasonably possible. However, as it develops its regulatory requirements for closed captioning, the Commission must take into account the fact that closed captioning is done most efficiently and economically during the production stage and that is where the Commission's captioning requirements should be directed. The captioning requirements for new programming should be phased-in over 10 years and guidelines, rather than strict requirements, should be considered to phase-in captioning for library programming.

Exemptions to closed captioning regulatory requirements should be allowed where reasonable and as permitted by Section 713. The Commission should not at this time adopt non-technical accuracy or quality standards for closed captioning; instead, the Commission should give the captioning community an opportunity to adjust to the new captioning environment created by Section 713. Finally, the Commission should adopt a reasonable enforcement mechanism that is designed to correct problems which may arise in the closed captioning process and do so through cooperative effort as much as possible.

If it adopts rules of this type, the Commission can “maximize the amount of programming containing closed captioning with appropriate exemptions and reasonable timetables to take into account the relevant technical and costs issues involved.”⁴

⁴ NPRM at par. 2.

II.

THE RESPONSIBILITY FOR COMPLIANCE WITH THE COMMISSION'S CLOSED CAPTIONING REGULATIONS SHOULD BE PLACED ON THE PRODUCERS AND OWNERS OF THE PROGRAMMING.

The Commission proposes in the NPRM that the responsibility for complying with its closed captioning requirements should be placed on the video programming providers -- the entity that brings the video programming directly into the customer's home -- regardless of the technology used to do so.⁵ The Commission makes this proposal even though it "recognize[s], from a practical standpoint, that captioning is most efficient at the production stage."⁶ The House Report also concluded that it was more efficient and economical to complete the captioning process at the production stage:

It is clearly more efficient and economical to caption programming at the time of production and to distribute it with captions than to have each delivery system or local broadcaster caption the program.⁷

Captioning of programming at the production stage is more efficient and economical because it can be completed once, instead of multiple times by

⁵ NPRM at par. 28.

⁶ NPRM at par. 6.

⁷ H.R. Report 104-204, 104th Cong., 1st Sess. at 114.

the hundreds, and perhaps thousands, of different providers that carry the programming on various distribution channels.⁸ And if closed captioning is done once, it will eliminate the possibility that different versions of a captioned program will be delivered to the viewing public.

Given that it is more efficient and economical to caption programming at the time of production, the Commission should not impose its captioning requirements on programming providers unless there is a compelling reason to do so. No such reason is set forth in the NPRM.⁹

The Commission says that programming providers should be responsible for captioning based upon two arguments. First, the Commission says that “programming providers are in the best position to ensure that the programming they distribute is closed captioned because of their role in the purchasing of programming from producers.”¹⁰ Second, the Commission says “that the direct link between consumers and their video

⁸ As a result, the societal costs for captioning will be lower if the captioning obligation is placed on the program owner.

⁹ Nor is there any reason to do so based on the statutory language of Section 713. The Section 713(b)(1) obligation to caption new programming is not imposed on programming providers. And Section 713(b)(2), which relates to the captioning of library programming, says that the Commission’s rules should ensure that “video programming providers or owners” maximize the captioning of library programming. (emphasis added).

¹⁰ NPRM at par. 28.

providers is an important consideration for ensuring compliance with our rules.”¹¹

Neither of these arguments is compelling. In the first place, it is not clear that a programming provider (a) can refuse to purchase programming that is not closed captioned, and (b) has a “direct link” to the customer. Customers, not program providers, will (and should) drive programming decisions. Accordingly, it is unrealistic to think that a provider, especially a small CATV operator, could simply refuse to carry popular programming that the owner refuses to caption. In fact, some programming, *e.g.* HBO, may be so popular that the owner may not be willing to provide captioning unless each and every program provider, acting in concert, required it. This kind of unanimity is unlikely.¹² The more likely result would be that a large, vertically integrated provider would agree to undertake the captioning obligation in return for exclusive distribution rights to the

¹¹ *Id.* Providers of video programming should not be responsible for closed captioning simply because telephone common carriers have responsibility for telephone relay service (“TRS”). See NPRM at par. 27. In fact, by not proposing any non-technical quality standards for its closed captioning regulations (NPRM at par. 111), the Commission has effectively recognized that the literal translation of a live conversation in real time by a common carrier’s TRS operator is not at all similar to closed captioning. It may be efficient and economical for a common carrier to provide the TRS translation in real time during a live, two-way telephone conversation; but, in the case of programming that is broadcast to the public, it is most efficient and economical to provide the captioning through a single source at the time of production.

¹² It also might raise antitrust issues.

programming and exclusive agreements of this type do not foster competition.¹³

The “direct link” between program providers and customers is not clear, either. For example, in the case of a “must carry” broadcast station, a provider may not have any necessary link -- direct, contractual or otherwise -- with the first program provider or the customer.

But even if a programming provider can refuse to purchase programming that is not captioned and does have a “direct link” to the customer, that does not mean that the provider is thereby in the best position to ensure that programming is closed captioned. Indeed, the Commission and the House Report already said otherwise when concluding that closed captioning is best done at the production stage.¹⁴ By imposing the closed captioning responsibility on providers, even though it is more efficient and economical for the producers and owners to perform this task, the Commission seems to be driven by expediency, *i.e.* place the responsibility on broadcast, cable, wireless and DBS providers because those

¹³ The Commission could prevent this result by placing the captioning obligation on the owner of the programming and requiring that, once programming has been captioned, such captioning must be made available to all providers which carry that programming.

¹⁴ NPRM at pars. 6 and 27.

are the entities over which the Commission currently exercises jurisdiction and therefore the regulations can be more easily enforced.

Yet, Section 713 does allow the Commission to exercise jurisdiction over the “owner” of the programming, at least insofar as is necessary to impose and enforce its closed captioning regulations. If this were not true, then it would not have been necessary for the Congress to say in Section 713(d) that the “owner” of the programming is eligible for an exemption of the Commission closed captioning regulations. The “owner” of programming, in this context, could be “the producer, copyright holder, syndicator or distributor”¹⁵ If the Commission’s closed captioning requirements were imposed on these “owners,” they could complete the captioning once and thereby ensure that multiple versions of closed captioning for that same programming are not created by various programming providers seeking to discharge their captioning responsibility. Then, the program “owner” could ensure that the one-and-only captioning is transmitted through the various distribution outlets by including the appropriate contractual provisions in their distribution contracts with those outlets.

¹⁵ NPRM at par. 29. Any one of these “owners” is closer than the provider to the point of production where captioning is most efficiently and economically completed.

There are other reasons why the Commission's captioning regulations should apply to the "owners" of the programming. Although Ameritech New Media does not have any contracts with such owners which prohibit Ameritech from carrying closed captions received with the rest of the video signal at the head-end,¹⁶ Ameritech generally is barred by its current contractual obligations from changing that video signal in any way, shape or form. This is true, not only for PEG access channels, but other programming, including must-carry and leased access channels, as well. In fact, in the vast majority of cases, Ameritech New Media does not even have an opportunity to continually monitor each video signal it receives at the head-end prior to distributing the signal through its cable system. But even if that capability were available, the video provider should not be put in the position of either censoring and interrupting a video signal that has not been properly captioned by the "owner," or letting the signal flow through and then seeking indemnification from the "owner" after a complaint has been filed by a disgruntled viewer.

¹⁶ Implementation of new captioning requirements cannot be initiated until new contracts between owners and programming are executed, and many of those contracts used throughout in the industry undoubtedly will not expire for several years. This would not affect the Commission's implementation plan for captioning if the Commission imposes its captioning requirements on the owner and then requires providers to carry the programming as it is presented, with captioning, to the viewing public.

If the Commission does impose captioning obligations on the programming provider and multiple providers are involved in the transmission, *e.g.* broadcast must-carry, then the first provider, *i.e.* the broadcaster, should be the provider that is obligated under the Commission's rules to ensure that the signal is captioned because the secondary provider, *i.e.* the cable operator, has no prerogatives under the must-carry rules to enforce captioning requirements with the "owner" because the provider has no contract with the program "owner."

However, Section 713 does not require that the Commission impose its closed captioning regulations on the programming provider, and there are several legitimate reasons why the Commission should not do so as a matter of policy. Instead, the Commission should impose its closed captioning obligations on the "owner" of the programming because captioning is done most efficiently and economically at, or closest to, the point of production.

III.

THE COMMISSION'S 10 YEAR PHASE-IN SCHEDULE FOR NEW PROGRAMMING GENERALLY IS REASONABLE, BUT SHOULD BE CLARIFIED IN SEVERAL MATERIAL RESPECTS.

The Commission recognizes that it would not be feasible to implement the immediate captioning of all new, non-exempt video programming and, therefore, proposes two phase-in schedules. One schedule covers 8 years, with an additional 25% required every two years. The other proposal covers 10 years, with 25% required after three years, 50% required after five years, 75% required after seven years and 100% required after 10 years.

Ameritech New Media generally supports the Commission's 10 year proposal, however, some important clarifications should be made. The first clarification is that the 10 year schedule would apply to program "owners." As discussed in the previous section, that is where the captioning responsibility belongs.

If the Commission decides otherwise and imposes captioning responsibility on the programming provider, then it still should adopt a 10 year schedule and measure compliance on the basis of the average monthly hours of programming for the last month of the period. In other words, the

cable operator would satisfy its captioning obligation if at least 25% of the programming carried on its cable system during the month next preceding the end of the first three year period is closed captioned.

No additional conditions should be imposed. The 25% requirement should not be channel specific or program specific. It should not be affected by the time of day a particular program is shown, the audience size, the type of provider or the number of homes passed by the system. Closed captioning should be treated like any other programming decision and the market should be allowed to determine how the provider goes about meeting its 25% requirement.

Finally, the Commission should clarify that exempt programming is not included in the universe of programming to which the 25% requirement is applied. But, on a related note, it is not unreasonable to require the provider to pass through video signals which are already closed captioned even though its 25% requirement already has been met.

IV.

THE COMMISSION SHOULD CONSIDER ESTABLISHING GUIDELINES, RATHER THAN REQUIREMENTS, FOR CAPTIONING LIBRARY PROGRAMMING.

The Commission correctly concludes that it would not be reasonable to mandate captioning of all or nearly all library programming. There would be a substantial cost burden in captioning all library programming. If the program “owner” did not have a reasonable opportunity to recover that cost, it might have the economic incentive to avoid the cost entirely by simply not making the programming available for viewing. That, of course, would limit the programming available to the public.

The Commission seeks to avoid these problems by requiring that some specific percentage, *e.g.* 75%, of library programming be captioned. This, however, creates other problems. How do you measure the percentage? Would the percentage be based on the library of a particular “owner”? How would the Commission handle programming in the public domain and on what basis would such programming be identified? How would one know whether a particular program had been viewed prior to the effective date of the Commission’s rules and therefore within the definition of library programming? Would the captioning requirement for library programming be phased-in? If so, pursuant to what schedule? What is the

reasoned basis on which the Commission could conclude that a 75% requirement for library programming is more or less reasonable than any other percent? Is there really a problem here that needs to be solved with additional regulatory requirements?

As it addresses these issues in this NPRM, the Commission should consider adopting guidelines or recommended targets for the captioning of library programming, rather than rigid requirements. This will give the Commission an opportunity to determine whether there really is a problem that needs to be addressed in the new Section 713 environment and, if so, whether it is better addressed through a market-based solution or government regulation.

V.

THE COMMISSION SHOULD PROVIDE FOR SEVERAL REASONABLE EXEMPTIONS TO WHATEVER CLOSED CAPTIONING REQUIREMENTS IT ULTIMATELY ADOPTS.

Section 713(d)(1) permits the Commission to exempt programs or classes of programs from its closed captioning requirements if captioning would be economically burdensome. According to the Commission, “economic burden” should be interpreted to mean that the economic burden

of captioning outweighs the benefits. The Commission also says that the complexity of captioning should be included in this balancing of interests.¹⁷

This is a reasonable standard and one that compels an exemption for several categories of programming. For instance, the Commission notes that an exemption should be provided for programming that is in languages which are not written in a Latin-based alphabet because television receivers generally are capable of decoding only Latin-based alphabets and symbols. The Commission's conclusions here are reasonable.

Likewise, programming that is primarily textual in nature should be exempted because the information provided in such programming is already presented in a visual context. The costs of captioning in this context clearly would outweigh any benefit.

Captioning for PEG access programming should be exempt under the Commission's regulations because of the small budgets involved in the production of such programming. Programming on leased access channels, on the other hand, should be treated like any other programming of the same or similar type.

¹⁷ NPRM at 70.

There should be a general exemption for instructional programming, except for such programming that is produced nationally and pre-recorded.¹⁸ This strikes a reasonable balance between those instructional programs that are produced on a small budget and those instructional programs that might be more readily captioned without significant additional expense, at least in a relative sense.

Advertising generally should be exempt. Although a case might be made that large institutional advertisers could afford captioning, it would be difficult if not impossible to separate those advertisers from others who produce advertisements on a more local, and low budget/low return basis. The Commission should rely on the marketplace to provide the incentive for advertisers to provide closed captions with their ads. But home shopping should not be generally exempt, even though it has some of the elements of advertising and is somewhat textual in format. Home shopping is essentially direct sales marketing that generally runs on a 7 day a week, 24 hour per day schedule as opposed to isolated, 30 or 60 second commercials. Therefore, home shopping is like more general non-exempt programming.

¹⁸ It may be difficult to determine whether particular programming is “instructional.” For example: Is programming on the Public Broadcasting Station (PBS) or Knowledge TV instructional? The Commission should adopt sufficiently clear guidelines in this area so that it does not have to make case-by-case determinations on this exemption.

Promotions should be exempt, however, given their relatively few number and the relatively short period of time in which they are produced and shown. Here, the costs of captioning probably outweigh the benefits.

Political advertising should be exempt. The cost of captioning could reduce the amount of political advertising that is shown, particularly for those local candidates who run for office on a relatively small budget.

Political advertising generally runs for a relatively short period of time and the revenues collected from political advertising may not even be sufficient to cover the captioning costs because lowest unit charges apply. Besides, it is likely that the “market” will drive candidates for political office, as owners of their programming, to caption their ads so captioning requirements probably are not necessary.

Fundraising for noncommercial broadcast stations also should be exempt, at least the live portion of their fundraising efforts, because the sole purpose of this programming is to raise funds. These stations will not need the Commission to order a captioned summary of the fundraising efforts to be run periodically; they probably will do so voluntarily.

The Commission needs to be very careful with respect to any requirements for the captioning of music programming, including music videos which, notwithstanding their visual aspects, still are essentially tones and sounds. Some music videos undoubtedly have budgets the size of short films and, therefore, captioning may be affordable. However, some of the lyrics of these videos, while unintelligible when spoken,¹⁹ may be patently offensive -- or potentially obscene -- to some viewers when presented in captioning. A program provider may not want to be associated with such lyrics. This is another sensitive balance the Commission must maintain in this docket. On a related note, it is entirely reasonable to exempt primarily instrumental programming.

Weather forecast programming should not be exempted because viewers may depend on such captioning to protect their health and safety.

Sports programming generally should be exempt because it is primarily visual. However, if the Commission decides otherwise and requires captioning for sports programming, an exception should be made based on cost considerations for locally produced sports programs, such as the production of local high school sports events.

¹⁹ This presents captioning problems for the program provider which would not be present if the caption requirements were directed to the program owner.

The Commission should not exempt “small” owners (or program providers) from its captioning requirements because there is no reasoned basis for doing so.

However, the Commission should grant an exemption from its captioning requirements if a programming provider cannot meet those requirements because of pre-existing contractual obligations with the program owner. But even if a program owner/provider contract does not prohibit captioning, the Commission should grant an exception for the duration of a programming contract that does not affirmatively address captioning one way or the other. The reason is simple: if the contract does not address captioning, and the Commission orders a provider to caption the programming, then the provider would be obligated to provide the captioning but have no recourse against the owner for recovery of the captioning cost and may not be able to recover captioning costs from its subscribers.

Finally, the Commission should establish a procedure for obtaining other exemptions based on undue burden under Section 713(d)(3). When evaluating such a petition, the Commission should consider the factors

listed in Section 713(d)(3) and any other factor raised in the petition. It would be unwise for the Commission to limit the scope of those factors by its order in this docket. Nor should the Commission limit particular entities from filing such a petition; rather, whoever is obligated to provide closed captioning under the Commission's rules should be eligible to file a petition for an exemption from those rules. Such an application should be supported by affidavit as is necessary under the circumstances. Finally, the Commission should adopt a relatively short period of time for rendering its decision on an exemption request since programming may be unavailable to the public during the time a request for exemption is pending.

VI.

THE COMMISSION SHOULD NOT ADOPT NON-TECHNICAL ACCURACY OR QUALITY STANDARDS.

The Commission's proposal not to adopt any non-technical accuracy or quality standards is reasonable.²⁰ The non-technical accuracy and quality aspects of closed captioning include "accuracy of transcription, punctuation, placement, identification of nonverbal sounds, pop-on or roll-up style, verbatim or edited for reading speed, and type font."²¹ As closed captioning becomes more commonplace over time, these non-technical accuracy and quality aspects of captioning will become more standardized and routinized. However, if the Commission were to adopt such standards now, it could have a chilling effect on existing and startup captioning vendors. The Commission should give the captioning community a reasonable opportunity to adjust to the new captioning environment created by Section 713 and only then determine whether non-technical accuracy and quality standards should be established through government regulation.

The Commission says that technical quality issues may be different. Here, the Commission says that program providers are technically capable

²⁰ NPRM at 111.

²¹ *Id.*

of transmitting closed captioning in their programming to customers.

Therefore, the Commission concludes that “program providers should be responsible for the transmission of the captioning and must take whatever steps are necessary to monitor their equipment and signal transmissions to ensure that captioning is included with the video programming that reaches consumers.”²² Ameritech New Media does not disagree with this requirement generally, but asks the Commission to consider the implications of a specific requirement to monitor the simultaneous transmission of 500 separate channels of digital programming; it is not reasonable to expect a program provider to have people monitoring each one of these channels for purposes of ensuring on a real time basis that program captioning is flowing through to the viewing public. If there is a disruption of closed captioning, then it should be handled like any other interruption of video programming signal. This should not be a problem if the Commission assigns the captioning responsibility to the program owner, requires the program owner to certify that its programs are captioned, and then requires the program provider to transmit the captioning with the program signal. The Commission should try this approach and see how well it works before adopting any further technical quality standards.

²² NPRM at par. 110.